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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,373	03/09/2004	Alain Leas	88265-74701	4476
28765 7590 11/10/2008 WINSTON & STRAWN LLP PATENT DEPARTMENT 1700 K STREET, N.W. WASHINGTON, DC 20006				
EXAMINER				
THAKUR, VIREN A				
ART UNIT		PAPER NUMBER		
1794				
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11/10/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 10/797,373	Applicant(s) LEAS ET AL.
Examiner VIREN THAKUR	Art Unit 1794

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 21 October 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 10/28/08. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Steve Weinstein/
Primary Examiner, Art Unit 1794

Continuation of 11, does NOT place the application in condition for allowance because: On page 4 of the response, applicants assert that there is no motivation or suggestion to combine Krein and D'Amato by concluding that Krein teaches that minimizing production costs was an integral concern in the development of his invention and that there is no concern or motivation to prepare a packaged product that includes clear plastic to highlight and exhibit the product therein. This argument has been considered but is not deemed persuasive. It is noted that Krein does not need to be relied on for addressing the problem of viewing the decorations on the food product, although, as discussed in the final office action, Krein does provide motivation to the ordinarily skilled artisan since the ice cream has a pleasing two tone appearance. In any case, the secondary reference has been relied on to address the problem of viewing the food product and the solution of employing transparent packaging. Regarding the particular economical considerations, it is noted that the statements relied on by applicant are based on the production capabilities at the time of Krein's invention (i.e. 1938) and not at the time of applicant's invention.

On page 5, 2nd paragraph, Applicant relies on paragraph 19 of the Rule 132 Declaration of Alain Leas to confirm that transparent packaging wrappers were known and available at the time of Krein's disclosure. It is noted that nowhere in paragraph 19 of the declaration has declarant stated that transparent packaging wrappers were known and available at the time of Krein's disclosure.

On page 5, 3rd paragraph to page 6, line 4, of the response, applicants assert that the plastic wrapping of the invention is also used as a mold for the shell and the plastic wrapping taught by D'Amato is not used as a mold to form the ice cream but rather for only holding the preformed cone. Firstly, it is noted that the claims do not recite any limitation with regard to the ice cream cone being molded by the packaging. In any case, as can clearly be seen by the teachings of Krein, the chocolate cone is sprayed into the lining material and then hardens. Therefore, Krein already teaches using the wrapping as a mold for forming an ice cream cone. The claim only differs in the particular material used for wrapping for which D'Amato has been relied on as previously discussed. Furthermore, it is noted that the claims are directed to the product and not to the method of making the product.

On page 6, applicant asserts that since D'Amato teaches that the plastic packaging should be able to withstand small shocks and be rigid enough to protect the ice package from damage, that this most likely means that the air in the package acts as a cushion while the plastic is strong enough to retain the air inside and to avoid tearing of the package or damage to the contents. Applicants' assertion is speculative regarding the air in the package to act like a cushion. It is noted that the art taken as a whole teaches the edible shell in complete surface to surface contact with the packaging and also provides motivation for employing transparent packaging, at the time of applicants' invention.

On page 7, Applicants' assert that Kuehl does not utilize a sleeve that conforms to the outer surface of the confection and maintenance of a smooth outer surface is not of importance to Kuehl. This is not persuasive for the reasons of record. As discussed above, it is noted that the art taken as a whole already teaches a sleeve that conforms to the outer surface of the confection. Applicants' further assert that Kuehl's confectionary product is prefabricated prior to being placed in its packaging, in contrast to the present invention, which is formed in the packaging sleeve. This argument is not persuasive, since the claims do not recite this limitation and further since the claims are directed to a product and not the method by which the product is made.

Regarding Newsteder, Applicants assert that the reference is directed to chocolate bars and not cones. As discussed in the final Office Action, Newsteder has been relied on to teach the concept of employing edible material to impart a particular design. Applicants further assert that the particular method by which Newsteder relies is different than that of applicants'. As discussed above, applicants' invention is directed to the product and not the method of making the product. In any case, the art taken as a whole already teaches wherein the edible shell is formed within the packaging sleeve. Newsteder, Kuehl, and Palmer and Phillips have all been relied on to teach that it was conventional to employ a second edible material onto a first edible material for the purpose of making a particular design. Kuehl already teaches using a second edible material to impart a particular design into the edible shell. As previously noted, regarding Newsteder, Palmer and Phillips, applicants' are asserting that the method for manufacture and the particular food products employed by these references are not related to the edible cones or ice cream bars. These references have been relied on to teach that it has been conventional in the art to employ a second edible material to impart a design. Even further, since the claims are directed to the product, the art taken as a whole teaches that it was conventional to employ designs using a secondary edible material. As further disclosed by Phillips et al., the designs are smooth (Figure 8 for instance). Therefore it would have been obvious to one having ordinary skill in the art to employ a secondary edible material used to impart a particular logo or design.